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No. 84-852

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ERNST & WHINNEY, a partnership; MICHAEL W. TRAPP, OLIVER C. MURRAY, JR., JERRY L. YOHEY, THOMAS P. HENSLER, III, ROBERT J. TAYLOR, IV, JOHN W. HYATT, JR., STEPHEN W. IMLER, JOHN DOE I through JOHN DOE V, Officers, Agents and Employees of Ernst & Whinney,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

LOWELL GORDON HARRISS
JEROME G. SNIDER
NANCY R. GRUNBERG
DAVIS POLK & WARDWELL
Of Counsel

DANIEL F. KOLB
1575 I Street, N.W.
Washington, D.C. 20005
(202) 789-7100
Counsel of Record for Petitioners

TRAMMELL E. VICKERY
3300 First Atlanta Tower
Atlanta, Georgia 30383
(404) 581-8500
Counsel for Petitioners

HANSELL & POST
Of Counsel

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Petitioners (hereinafter collectively referred to as "E&W") submit this reply to the government's memorandum opposing their petition for certiorari. The government's memorandum is striking. After requesting and receiving two extensions of time to reply, the government does not dispute E&W's assertion that the decision below conflicts with decisions of this Court and Courts of Appeal holding that a statutory grant of jurisdiction to federal courts does not empower such courts to create new sub-

stantive duties (*see* Pet. 10-16). Nor does the government dispute E&W's contention that, contrary to decisions of this Court (*see* Pet. 16-21), the decision below undermines the comprehensive remedial framework carefully devised by Congress to limit the circumstances in which the government may seek injunctive relief.

The government has not and, in the three months it was permitted, could not refute those assertions. Rather, the government argues that the petition is not "ripe" for consideration by this Court. The government's argument is specious.

The matter is ripe for review by this Court for two reasons. First, if it is not reviewed now E&W will be denied the very rights it is seeking to protect. As explained in the petition, Congress in 1976 and 1982 enacted a comprehensive remedial statutory plan for the civil regulation of tax return preparers and advisers under the Internal Revenue Code. In enacting those provisions, Congress explicitly decided that tax advisers and tax return preparers should be subject to injunction by the United States only in limited circumstances. Tax advisers are only subject to injunction if they promote abusive tax shelters. Tax return preparers are subject to injunction for a broader variety of conduct, but the United States is barred from seeking injunctive relief against tax return preparers on specified claims if the preparers post statutory bonds. If a bond is posted—as it was in this case—then the government's claims may not be litigated in a federal district court but instead only in a non-injunctive administrative proceeding. The bonding provision thus confers upon a tax return preparer the right to protect itself from the burden and expense of an action in federal court. (Pet. 5.) If, without review by this Court, E&W is now made to litigate this matter to judgment in a federal court injunction action, E&W will have been denied the right it is seeking to vindicate—to avoid the expense and

burden of that injunctive litigation. Only if this Court acts now can petitioners' rights be sustained.[1]

The matter is also ripe for review because, as the government does not deny, the issues presented are purely legal. The issues do not turn on fact questions, or further development of facts. The legal issues are whether federal courts may entertain actions for injunctive remedies which Congress explicitly denied the government, and whether the federal courts may enjoin conduct not proscribed by statute merely because jurisdiction to issue an injunction in aid of enforcement of the law has been conferred. No trial is needed to resolve those issues; and if a trial is held, E&W will have been denied its right to avoid the cost and burden of a trial.

Consistent with E&W's position, this Court has repeatedly granted certiorari *before* a dispute has been resolved where the questions presented related to the proper forum for or nature of a proceeding to resolve the dispute. *E.g., Greene v. United States*, 376 U.S. 149 (1964); *Beacon Theatres v. Westover*, 359 U.S. 500, 501, 504 (1959); *La Buy v. Howes Leather Co., Inc.*, 352 U.S. 249 (1957); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 43-44 (1938). Such a case is, in fact, now pending before this Court. In *Dean Witter Reynolds Inc. v. Byrd*, No. 83-1708, the issue is whether certain state claims should be combined with federal securities claims and litigated in federal district court or whether, instead, the state claims should be severed from the federal cause of action and be arbitrated. The issue in that action, as here, is in which forum and with what procedures the dispute should be litigated.

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[1] The government suggests that the court injunctive proceeding has been seriously delayed and that further "interlocutory" review would cause "serious additional delay" and should therefore be denied. Mem. Opp. 8 n.8. The issue is not delay, but whether there should be *any* court injunctive proceeding.

Indeed, the government itself has repeatedly sought, and the Court has repeatedly granted, certiorari in the same procedural posture that is presented here. *See, e.g., United States v. Rodgers*, 461 U.S. 677, 103 S.Ct. 2132 (1983).

In an effort to portray the issues before the Court as not "ripe", the government argues that even if this Court were to grant certiorari and rule in E&W's favor on Section 7402(a), an action would still proceed under Section 7407 because E&W does not challenge the finding of the Court of Appeals as to Section 7407. The government is wrong for two reasons. First, in its petition E&W by no means meant to suggest that it would not argue before this Court that the Court of Appeals was wrong as to Section 7407. Instead, as indicated in the petition, it is and has at all times been E&W's position that all of the conduct alleged against it as a preparer is covered by the bonding provision of Section 7407(c) and that, in accordance with the decision of the District Court, no injunctive action is permitted. Because the Court of Appeals' holding as to Section 7407 is very narrow, E&W did not emphasize it as a reason to grant certiorari. Nevertheless, contrary to the government's assertions, it did intend that, if certiorari was granted, the narrow issue as to Section 7407 would be encompassed by the issues for review.

Second, even if the government's suggestion were correct and an injunctive proceeding involving Section 7407 would continue, such an injunctive proceeding under the Court of Appeals' holding would be very limited. That such a very limited proceeding might continue would not, in light of the congressional remedial scheme, justify requiring E&W to participate in a far broader, lengthier, and costlier injunctive proceeding pursuant to Section 7402(a). The Court of Appeals' holding as to Section 7407 is limited to one narrow unpleaded theory. The government's position as to Section 7402(a) is that it

may litigate all the many issues presented in the original pleadings to the extent E&W is a tax adviser. It is the burden of such federal court litigation that the Congressional remedial plan permits a tax return preparer to avoid and which E&W is entitled to avoid.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Dated: February 26, 1985

Respectfully submitted,

LOWELL GORDON HARRISS
JEROME G. SNIDER
NANCY R. GRUNBERG
DAVIS POLK & WARDWELL
Of Counsel

HANSELL & POST
Of Counsel

DANIEL F. KOLB
1575 I Street, N.W.
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(202) 789-7100
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